4-23-1976

James Berry v. Commonwealth of Kentucky

Appellee's Brief 1976-SC-0305

APPELLEE'S BRIEF

3809

SUPREME COURT OF KENTUCKY

File No. 76-305

JAMES BERRY — APPELLANT

V. — APPEAL FROM JEFFERSON CIRCUIT COURT

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

ROBERT F. STEPHENS
ATTORNEY GENERAL

GUY C. SHEARER
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

DAVID ARMSTRONG
COMMONWEALTH ATTORNEY
30th Judicial District

COUNSEL FOR APPELLEE

I hereby certify that a copy of Brief for Appellee was mailed, postage prepaid, to Hon. John P. Hayes, Judge, Jefferson Circuit Court, 2nd Division, Criminal Branch, Courthouse, Louisville, Kentucky 40202; Hon. David Armstrong, Commonwealth Attorney, 30th Judicial District, 401 Kentucky Home Life Building, Louisville, Kentucky 40202; and Hon. Thomas E. Clay, Assistant Public Defender, Office of Jefferson District Public Defender, 1000 Republic Building, Louisville, Kentucky 40202, this 23rd day of April 1976.

Guy C. Shearer
Assistant Attorney General

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V.

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CRIMINAL BRANCH, 2ND DIVISION
HON. JOHN P. HAYES, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

STATEMENT OF QUESTION PRESENTED BY APPELLANT

> MAY A SENTENCING COURT ARBITRARILY REFUSE TO SUSPEND THAT PORTION OF ITS JUDGEMENT WHICH IMPOSES A FINE UPON AN INDIGENT PRISONER, THUS PERPETUATING HIS DETENTION UNDER COMMITMENT ORDER WHICH ADVERSELY AFFECTS THE PRESENT TERMS OF HIS CONFINEMENT?

On the 30th day of April 1971, the Jefferson County Grand Jury returned Indictment # 144546 in which it charged that the appellant herein illegally possessed narcotics and illegally sold narcotics (TR 2). The charges read:

"COUNT I

> That on or about the 21st day of February 1971, in Jefferson County, Kentucky, the above-named defendant unlawfull had in his possession an amount of a narcotic known as Heroin.

"COUNT TWO

> "That on or about the 21st day of February 1971, in Jefferson County, Kentucky, the above named defendant unlawfully sold to Charles Baker, Sr. an amount of a narcotic known as Heroin.
>
> Both against the peace and dignity of the Commonwealth of Kentucky."

On the 8th day of February 1972, the case came on for trial by jury in the court of Judge John P. Hayes. A jury was duly empaneled and the case heard. At the conclusion of the evidence the jury was properly instructed and pursuant to the court's instructions a verdict was returned. The jury found the appellant guilty under Instruction No. I and fixed his punishment at confinement in the penitentiary for twenty years and by a fine of $20,000.00.

Thereafter, Mr. John E. Taylor of the law firm of Eubanks, Gardner and Schaefer, was stricken as the appellant's attorney and Mr. Victor W. Dungan was appointed attorney for appellant.

On February 25, 1972, judgment was entered in conformance with the verdict, and the appellant was ordered to be committed to the Kentucky Department of Corrections to serve "a term of not more than 20 years and a fine of $20,000" (TR 3-4).

Thereafter, the appellant prosecuted an appeal to the Kentucky Court of Appeals raising issues not relevant to the present appeal, and the conviction was affirmed. See Transcript of Former Appeal, Docket No. S19972; Berry v. Commonwealth, Ky., 490 S.W.2d 741 (1973). He then prosecuted an unsuccessful

federal habeas corpus action, in which he raised the same issues relied upon in the state court and also the issue now raised on this appeal; but he was denied consideration of the present issue because he had failed to exhaust his state remedies. See Berry v. Cowan, 497 F.2d 1274 (6th Cir. 1974).

On December 11, 1975, the appellant filed in the trial court below a Motion to Vacate, Set Aside or Correct Sentence (TR 4-7). The trial court passed the motion for a response by the Commonwealth (TR 4). On January 15, 1976, the trial court overruled the Motion to Vacate, Set Aside or Correct Sentence (TR 4-7).

On January 20, 1976, appellant filed his notice of appeal and a motion to proceed in forma pauperis, which was sustained by the trial court (TR 7-9). An appeal is now before this Court for its consideration.

The appellant contends in his statement of the facts (page 3 of his Brief) that:

> "The factual allegations of the appellant's verified Motion to Vacate, Set Aside or Correct Sentence, presented to the trial court on December 11, 1975, are as follows (TR 5):
>
> 1. On February 25, 1972, this court entered a judgment against the defendant herein imposing a sentence of twenty (20) years and a fine of twenty thousand dollars ($20,000).
>
> 2. The defendant is presently confined in the Kentucky State Penitentiary pursuant to a commitment order issued by this court to implement this judgment.
>
> 3. The defendant is presently serving the sentence of twenty (20) years, but the commitment order under which he is confined also requires the satisfaction of the fine of twenty thousand dollars ($20,000).

"4. This commitment order operates as a detainer to preclude the release of the defendant until the fine is satisfied by payment or by service by the defendant. As a consequence, it also has the effect at the present time of denying to the defendant certain institutional privileges which are available to prisoners who are serving a unitary sentence with no detainers.

5. The defendant is presently indigent and totally unable to pay the fine of twenty thousand dollars ($20,000). He has no prospects of being able to pay this fine at any time prior to his release from the penitentiary."

In addition to the contention in paragraph 4 above, the appellant-movant in his argument contends: "A sentencing court may not arbitrarily refuse to suspend that portion of its judgment which imposes a fine upon an indigent prisoner, thus perpetuating his detention under a commitment order which adversely affects the present terms of his confinement."

The appellee contends that neither the evidence, record nor the law supports the appellant's contentions. Section 2 of the Kentucky Constitution reads:

"Absolute power does not exist in a republic. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Appellant alleges that this section of the Constitution was violated, but the question confronting us is just how, during the course of the trial, the appellant's rights were violated. That burden is upon the appellant. How was Section 2 of the Kentucky Constitution during the course of the trial prejudicially violated by the Commonwealth?

ARGUMENT

THE SENTENCING COURT DID NOT ARBITRARILY REFUSE TO SUSPEND THAT PORTION OF ITS JUDGMENT WHICH IMPOSES A FINE UPON AN INDIGENT PRISONER OR DO ANYTHING WHICH WOULD PERPETUATE HIS DETENTION UNDER COMMITMENT ORDER WHICH ADVERSELY AFFECTS THE PRESENT TERMS OF HIS CONFINEMENT.

The court may determine from the record of the evidence and proceedings in this case whether there exists valid reason for setting aside the judgment of conviction in the Jefferson Circuit Court.

The appellee denies that the appellant has presented the trial court with either the evidence or sufficient legal authority to justify the relief sought by the movant through his motion.

The case of Marcum v. Broughton, 442 S.W.2d 307 (1969) appertained primarily to bail bond and the Commonwealth's failure to sustain its burden on the bail question but offered principally hearsay testimony given by a police officer who merely related what an eyewitness to the killing had told him. It was the Commonwealth's duty to sustain its burden by proof competent under the ordinary rules of evidence. Hence, the facts and evidence differ from those in the instant case and are not controlling in the instant case. The court merely held in Marcum, supra, that the accused was entitled to reasonable bail. The facts differed radically from those in the instant case. Bail had been revoked in the Marcum case without

reason for the revocation or a hearing held thereon.

In his Motion to Vacate the Judgment, the movant stated:

> "6. An indigent person cannot be confined or detained due to his inability to pay fines. Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971); Spurlock v. Noe, Ky., 467 S.W.2d 320 (1971).
>
> 7. A detainer requiring the service of a sentence upon the conclusion of another sentence is the equivalent of present detention. See Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969).
>
> 8. That portion of the sentence and the commitment order of this court relating to the fine of twenty thousand dollars ($20,000) is thus causing the unlawful confinement of the defendant at the present time."

In the instant case the jury returned the guilty verdict fixing both the twenty-year sentence and the $20,000 fine. The court imposed the sentence pursuant to the jury verdict. There was nothing improper about either the court's sentencing or the jury's verdict. Hence, no section of the Constitutions, federal or state, were violated. The trial, verdict and sentencing of the appellant were regular in every respect and appellant's brief does not offer a single reason for the vacating of the judgment.

The appellant requests that this case be remanded back to the trial court for a hearing on the motion to vacate. The trial judge is certainly allowed reasonable discretion in making his decisions on motions to vacate judgments. In the instant

case the judge, having heard it only a short time before, apparently believed there was little, if any, merit in the movant's motion in which he relied upon allegations in paragraphs 6, 7 and 8, supra, for relief.

If some prison administrative regulation or rule seeks to or does detain movant because of his inability to pay the $20,000 fine, there are other means of getting the regulation to harmonize with the present prevailing case and statutory law. Such regulations would not be a basis for vacating the properly obtained judgment in the circuit court.

The evolution of the present controlling case law theory to the effect that "an indigent" could not be held in confinement "solely because he is too poor to pay fines imposed by a state court" which offenses "are punishable by fine only" constitutes an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment came about as a result of the following cases: Williams v. Illinois, 399 U.S. 235, 26 L.Ed.2d 586, 90 S.Ct. 2018; Griffin v. Illinois, 251 U.S. 12, 100 L.Ed.891, 76 S.Ct. 585, 55 ALR 2d 1055, Vol. 55, page 1; Tate v. Short, 401 U.S. 395, 28 L.Ed.2d 130, 91 S.Ct. 668 (1971).

In 1974, House Bill 232 was enacted which put a $10,000 limit on fines in felony cases, or double the gain from commission of the offense, whichever is greater. See KRS 534.030. The legislation did not become effective until January 1, 1975.

The appellant does not allege or claim that he has completely served the imprisonment portion of the sentence set by the jury nor does he claim that the sentence should be set aside because of his inability to pay, but that the lower court should be required to hold a hearing on paragraphs 6, 7 and 8 of the 11.42 motion. The trial judge has reasonable latitude in the matter of holding such a hearing.

The case of Spurlock v. Noe, Ky., 467 S.W.2d 320 (1971) was a habeas corpus action and involved a prisoner who had served the imprisonment portion of his sentence and his confinement was solely due to his lack of money. Hence, the case is not controllingly applicable to the instant case.

The trial court did not and does not arbitrarily refuse to suspend that portion of the court's judgment which imposes a fine upon an indigent prisoner, thereby perpetuating his detention under a commitment order which adversely affects terms of his confinement. Nor did or has the trial court been guilty of an abuse of the use of its discretionary power in imposing the sentence without further comment. Nor has the appellant sought to alter or remove any existent prison rule or regulation which might result in an extension of service of the prison sentence beyond the twenty-year period. His remedies have not exhausted in such matters. The case law and statutory law, KRS 534.030, both prevent such action by the court.

The contention of the appellant as to the extension of service of the prison sentence will result from his inability to pay the fine is presumptive and certainly not conclusive.

It also appears to be a premature presumption. Where or how does the appellant arrive at such a presumptive conclusion? Just how the holding of a hearing would prevent or correct the matters about which he complains is not clear.

The case of Richard M. Smith v. Fred M. Hooey, 393 U.S. 374, 21 L.Ed.2d 607, 89 S.Ct. 575 (1969) involved a speedy trial, the minimizing anxiety and concern accompanying public accusation and long possible delay that could result in the accused person's ability to defend himself and is not controllingly applicable in the instant case.

Just how "that portion of the (movant's sentence) and the commitment order of the court relating to the fine of twenty thousand dollars ($20,000.00) is thus causing the unlawful confinement of the defendant at the present time" does not appear in the record. Nor does deprivation of appellant's equal protection of the laws and of due process of law in violation of the United States Constitution appear therein.

CONCLUSION

The judgment of the Jefferson Circuit Court should be affirmed.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

GUY C. SHEARER
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

DAVID ARMSTRONG
COMMONWEALTH ATTORNEY
30th Judicial District

COUNSEL FOR APPELLEE